FCC MAIL SECTION

DOCKET FILE COPY ORIGINAL

Nov 15 11 04 AM '96

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
in the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	
	)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1996 **Released: November 7, 1996**

Comments Due: February 7, 1997
Reply Comments Due: March 7, 1997

By the Commission: Commissioners Quello, Ness, and Chong issuing separate statements.

Table of Contents

I. INTRODUCTION

1. On December 15, 1994, we adopted a *Notice of Proposed Rule Making* to seek comment on several issues concerning our broadcast attribution rules, the rules by which we define what constitutes a "cognizable interest" in applying the multiple ownership rules.[1] The attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.[2] Our goals in commencing this proceeding were and continue to be to maximize the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees, and facilitate application processing.

2. We issue this *Further Notice* against the backdrop of the relaxation of our ownership rules resulting from the passage of the Telecommunications Act of 1996 ("1996 Act").[3] We now seek comment as to how these ownership rule revisions should affect our review of the attribution rules. We also seek comment on new proposals, including a provision to attribute the otherwise nonattributable interests of holders of equity and or debt in a licensee where the interest holder is a program supplier to a licensee or a same-market media entity (as discussed below) and where the equity and/or debt holding exceeds a specified threshold. Additionally, we seek renewed comment on a proposal to attribute Local Marketing Agreements ("LMAs").[4] We also invite comment on whether we should revise our approach to joint sales agreements ("JSAs") in specified circumstances. We also seek comment on a study conducted by Commission staff, appended to this *Further Notice*, on attributable interests in television broadcast licensees and on the implications of this study for our attribution rules, particularly on the voting stock benchmarks. Finally, we invite comment as to whether we should amend the cable/Multipoint Distribution Service ("MDS") cross-ownership attribution rule.

---

[1] *Notice of Proposed Rule Making*, 10 FCC Rcd 3606 (1995) ("*Attribution Notice*" or "*Notice*").

[2] *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984) ("*Attribution Report*"), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986); *Attribution Notice*, ¶¶ 13-14.

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[4] In this *Further Notice*, we refer to LMAs or time brokerage agreements. For purposes of applying the radio LMA rules, the Commission's rules define time brokerage as "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." 47 C.F.R. § 73.3555(a)(4)(iii). While we have generally used the terms interchangeably, we will refer herein to LMAs as those time brokerage agreements involving a broker that is a licensee of one or more stations in the same market as the brokered station.

II. BACKGROUND

3. Our current broadcast attribution rules are set out in the Notes to Section 73.3555 of the Commission's rules,[5] and, insofar as the broadcast-cable cross-ownership rule is involved, see *infra*, ¶¶ 8, 16, 27, in the Notes to Section 76.501 of the Commission's rules.[6] We issued the *Notice* broadly to review the attribution rules based on several considerations, including: (1) changes in the broadcasting industry and in the multiple ownership rules since our last revision of the attribution rules in the 1980's and our consequent desire to ensure that the attribution rules remain effective; (2) concerns raised that certain nonattributable investments, while permissible under current rules, might permit a degree of influence that warrants their attribution; (3) concerns that individually permissible cooperative arrangements between broadcasters are being used in combination so as to result indirectly in substantial influence in multiple stations that could not be held under the multiple ownership rules; and (4) the need to address attribution treatment of Limited Liability Companies ("LLCs").[7]

4. In this *Further Notice*, we do not specifically discuss a number of issues raised in the *Notice*, including treatment of Limited Liability Companies ("LLCs") and treatment of limited partnerships. Nonetheless, these issues remain outstanding, and we intend to resolve the entire set of issues raised in the *Notice* and in this *Further Notice*, together, after the comments received in response to this *Further Notice* are received and reviewed.

---

[5] The following corporate interests are generally attributable under these rules: voting stock interests amounting to five percent or more of the outstanding voting stock, except for passive investors (*i.e.*, bank trust departments, insurance companies, and mutual funds) for which there is a ten percent benchmark; and positions as officers and directors. The following corporate interests are not currently attributable: minority stockholdings in corporations with a single majority shareholder; nonvoting stock; other nonvoting instruments such as options or warrants; and debt. All partnership interests are currently attributable, except sufficiently insulated limited partnership interests upon a certification that the limited partner is not materially involved, directly or indirectly, in the management or operation of the partnership's media-related activities.

[6] 47 C.F.R. § 76.501. We recognize that the attribution standards used in a number of other cable rules are implicitly or explicitly based on Section 76.501. For example, the attribution standards in the cable television horizontal ownership, channel occupancy and program access rules are derived from these attribution Notes. We are considering initiating a separate proceeding to address whether to modify the attribution criteria for these rules. In the instant proceeding, we are addressing only the attribution criteria that would apply to Section 76.501(a), the cable-broadcast cross-ownership rule. Additionally, we will consider changes to the cable/MDS cross-ownership attribution rule.

[7] Among the issues on which we solicited comment in the *Attribution Notice* were: (1) whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive investor benchmark from 10 percent to 20 percent; (2) whether and, if so, under what circumstances to attribute nonvoting shares; (3) whether to retain our single majority shareholder exemption from attribution; (4) whether to revise our insulation criteria for limited partners, and whether to adopt an equity benchmark for noninsulated limited partners; (5) how to treat interests in LLCs and other new business forms under our attribution rules; (6) whether to eliminate the remaining aspects of our cross-interest policy; and (7) how to treat financial relationships and multiple business interrelationships which, although not individually attributable, should perhaps be treated as attributable interests when held in combination.

III. ISSUE ANALYSIS

A. Impact of the 1996 Act

5. The 1996 Act relaxed our broadcast station multiple ownership rules. Section 202 of the 1996 Act directed the Commission to eliminate national radio multiple ownership limits, to relax significantly local radio ownership rules, to eliminate the limit on the number of television stations that a person or entity may directly own nationwide, and to raise the national television audience reach cap to 35 percent. The 1996 Act also directed the Commission to extend its one-to-a-market waiver policy, 47 C.F.R. § 73.3555(c), to the top 50 markets, consistent with the public interest, convenience, and necessity, and to review its television duopoly rule, 47 C.F.R. § 73.3555(b).

6. In two *Orders* released on March 8, 1996, the Commission amended its ownership rules to reflect: (1) the elimination of the numerical national television ownership caps and the increase in the national television ownership audience reach cap to 35 percent; and (2) the elimination of national radio ownership limits and the relaxation of the local radio ownership limits.[8] In a companion *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 & 87-8, adopted today, the Commission invites further comment on a number of issues concerning the local television ownership rules, including extension of the one-to-a-market waiver policy and possible grandfathering of existing television LMAs, should we ultimately determine that these arrangements are attributable.[9]

7. We invite comment in this proceeding as to whether the changes resulting from passage of the 1996 Act should affect our discussion of the attribution and cross-interest issues raised by the *Notice*, and, if so, how. The relaxation of our multiple ownership rules does not itself require either a relaxation or tightening of the attribution rules. It does, however, reinforce our belief that the attribution rules must function effectively and accurately to identify all interests that are relevant to the underlying purposes of the multiple ownership rules and that should therefore be counted in applying those rules. As importantly, we seek to identify clearly those interests that do not and should not implicate concerns raised by the multiple ownership rules and that should not, therefore, be counted. We invite comment on these issues, and we specifically invite

---

[8] *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, FCC 96-90, 61 Fed. Reg. 10689 (March 15, 1996); *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996).

[9] FCC 96-438, released November 7, 1996 ("*TV Ownership Second Further Notice*"). In the *Television Ownership Second Further Notice*, we note our inclination to grandfather television LMAs that were entered into before the adoption date of the *TV Ownership Second Further Notice*. Television LMAs that are entered into on or after the adoption date of the *TV Ownership Second Further Notice* would be given a brief period to terminate the contractual relationship. *Id.* at Section IV.

commenters to update the record on the impact of the 1996 Act on the issues raised in the *Notice*, including those not discussed again in this *Further Notice*, such as LLCs and the cross-interest policy.

B. New Attribution Issues and Proposals

8. In this *Further Notice*, we explore additional issues and proposals to increase the precision of our attribution rules. First, we invite comment on whether we should add a new "equity or debt plus" attribution rule to the current rules. If adopted, such a new rule would limit, but not eliminate, the single majority shareholder and nonvoting stock attribution exemptions and would address our concerns, expressed in the *Attribution Notice*, about whether certain multiple business interests should be attributable when held in combination. Under such a rule, where the interest holder is a program supplier or same-market broadcaster or media entity subject to the broadcast cross-ownership rules,[10] we would attribute its otherwise nonattributable equity and/or debt interest in a licensee or other media entity subject to the cross-ownership rules if the equity and/or debt holding is greater than a specified benchmark.[11] Second, we incorporate into this proceeding our proposal to attribute television time brokerage agreements (or LMAs) based on the same principles that currently apply to radio LMAs.[12] Thus, we tentatively conclude that we should treat time brokerage of another television station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours as being attributable, and therefore as counting toward the brokering licensee's national and local ownership limits.[13] Third, we invite comment as to whether we should attribute joint sales agreements among broadcasters in the same markets, at least under certain circumstances, and as to what factors should make such contractual relationships attributable. With respect to television stations, the definition of what is the same "market" for purposes of applying the "equity or debt plus" attribution standard, if adopted, as well as for applying the proposals to attribute LMAs and JSAs, will be resolved in the television local ownership proceeding.[14] For radio stations and other entities covered by our broadcast attribution rules, we would define the same "market" by reference to the definition of the market used in the underlying multiple ownership rule that is implicated.

---

[10] 47 C.F.R. §§ 73.3555(c), 73.3555(d), & 76.501(a).

[11] We will refer herein to such media entities or outlets proposed to be subject to the "equity or debt plus" approach as "same-market broadcasters" simply as a shorthand. Thus, when we refer to a "same-market broadcaster" in this *Further Notice* in the context of discussing the "equity or debt plus" approach, we include daily newspapers and cable operators.

[12] We earlier raised this proposal in the television ownership proceeding, *Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 & 87-8, 10 FCC Rcd 3524, ¶¶ 138-40 (1995) ("*TV Ownership Further Notice*"), but now intend to resolve the issue of treatment of LMAs in this attribution proceeding. We will resolve the issue of possible grandfathering of LMAs in the television ownership proceeding. *See* ¶ 29 *infra*.

[13] *TV Ownership Further Notice*, ¶ 138.

[14] *See TV Ownership Second Further Notice*, Section II.

1. **"Equity or Debt Plus"**

9. Background. In the *Attribution Notice*, we expressed concern that our earlier conclusion that a minority shareholder could not exert significant influence on a licensee where there is a single majority shareholder may not be a valid conclusion in all circumstances.[15] We also noted our concern that nonvoting shareholders could, in certain circumstances, carry appreciable influence that is not now attributed.[16] Accordingly, we invited comment on whether to restrict or eliminate current attribution exemptions for nonvoting shares and for minority voting shareholders in a corporation with a single majority shareholder. In addition, we requested comment on whether we should adopt new attribution rules or policies when multiple financial or business relationships were held in combination in a licensee.[17] We noted that such multiple relationships could in combination with equity or debt interests create sufficient influence to warrant attribution. While we expressed these concerns, we did not delineate specific proposals to address them.

10. We received several comments concerning these issues. Most commenters urged us to retain the single majority shareholder and nonvoting stock exemptions from attribution.[18] However, network affiliates have expressed concerns that the exemptions have allowed networks to extend their nationwide reach by structuring nonattributable deals in which the networks effectively exert significant influence if not control over licensees.[19] In addition, while most

[15] *Attribution Notice*, ¶ 51.

[16] *Attribution Notice*, ¶ 53.

[17] For an example of a case involving multiple combined relationships, see note 27 *infra*. In that case, we issued a grant conditioned on the outcome of this proceeding, deeming the combined interests nonattributable in the interim.

[18] Association of Independent Television Stations, Inc., now known as Association of Local Television Stations, Inc. ("ALTV"), for example, argued that minority shareholders in a corporation with a single majority shareholder have no legal control over the corporation and that nonvoting stock conveys no legal power to control the affairs of a corporation. Comments of ALTV at 8. Also, EZ Communications, Inc. ("EZ"), a publicly-traded corporation with a single majority shareholder, noted that the ability to sell a nonattributable minority interest is important to facilitate raising capital, particularly for small businesses, that very few abuses of the exception have been brought to the FCC's attention, and that curtailing the exception would run counter to the Commission's interest in fostering investor certainty and consistency and the efforts to help broadcasters compete with other media. According to EZ, current case law interpreting what constitutes a transfer of control under Section 310(d) of the Communications Act, which prevents unauthorized transfers of control, provides adequate guidance for any cases that may occur. Comments of EZ at 2-4.

[19] *See* Consolidated Comments of AFLAC Broadcast Group ("AFLAC") at 15-19; Consolidated Reply Comments of AFLAC at 3-4; Reply Comments of Network Affiliated Stations Alliance ("NASA") at 2-3, 6-7.

parties were generally opposed to a case-by-case attribution approach,[20] several parties agreed that there is a need to adopt new policies with respect to multiple business interests, or at least to clarify our existing policies in this regard.[21] One commenter was generally opposed to relaxing the attribution rules.[22] NABOB commented that "[a]ny relaxation of the attribution rules will allow an increase in the concentration of control of the industry," adding that an increased concentration of control "works against diversity of viewpoints and works against minority ownership."[23]

11. In light of the broad divergence of opinion in the comments, we believe it would be desirable to explore a balanced, specifically-tailored approach that would focus the rules more precisely on those relationships that potentially permit significant influence such that they should be attributed. Accordingly, based in part on our review of the comments, which underscore the concerns expressed in the *Notice*, and in response to recent cases, we invite comment on a new "equity or debt plus" attribution rule. Many of the concerns sought to be addressed by the proposed "equity or debt plus" attribution approach have traditionally been dealt with under the cross-interest policy. A chief benefit of the new proposed approach, as discussed further below, is that it would permit greater certainty and predictability in deciding future cases than the cross-interest policy, which has traditionally been applied on an *ad hoc*, case-by-case basis.

12. Overview of Approach. The new rule would operate in addition to other attribution standards and would attempt to increase the precision of the attribution rules, address the foregoing concerns about multiple nonattributable relationships, and respond to concerns about abuses of the single majority shareholder and nonvoting stock attribution exemptions. This approach would not eliminate the nonvoting and single majority shareholder exemptions from attribution, but would limit their availability in certain circumstances. Under this approach, we would attribute the otherwise nonattributable debt or equity interests in a licensee where: (1) the interest holder also holds certain other significant interests in or relationships to a licensee or other media outlet subject to the cross-ownership rules that could result in the ability to exercise significant influence; and (2) the equity and/or debt holding exceeds specified thresholds. We seek to apply bright line attribution tests wherever possible. Accordingly, we invite comment on what the appropriate threshold(s) for these purposes should be and specifically whether we should set the threshold at 33 percent where the interest holder is: (1) a program supplier to the licensee,

[20] According to joint comments filed by M/C Partners, The Blackstone Group, and Vestar Capital Partners ("M/C"), for example, the Commission should retain its current system of analyzing different types of ownership interests independently, which leads to valuable predictability for investors pondering specific types of investments. Reply Comments of M/C at 5.

[21] *See, e.g.*, Consolidated Comments of AFLAC at 15, 21-23; Comments of Capital Cities/ABC, Inc. ("ABC") at 13-17.

[22] Comments of National Association of Black Owned Broadcasters ("NABOB") at 10.

[23] *Id.* at 13.

as will be discussed below, or (2) a same-market broadcaster or other media outlet subject to the broadcast cross-ownership rules, including newspapers and cable operators. We emphasize that, under the "equity or debt plus" approach delineated herein, a finding that an interest is attributable would result in that interest being counted for all applicable multiple ownership rules, local and national.

13. The "equity or debt plus" approach is narrower than that discussed in the *Notice* with respect to resolving our concerns that multiple nonattributable business interests could be combined to exert influence over licensees. It also does not go so far as to repeal the current nonvoting stock and single majority shareholder attribution exemptions; except in cases involving a same-market broadcaster or a program supplier or any other relationship category that we delineate, the single majority shareholder and nonvoting stock exemptions would continue to apply as they do now. This approach reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. To the extent that it misses some situations that might be of concern, we, of course, would reserve the right to address extraordinary cases on an *ad hoc* basis and in a manner consistent with the public interest. We invite comment as to whether the "equity or debt plus" option should be adopted, and, if so, whether the 33 percent benchmark is appropriate and whether other relationships to or interests in a licensee should also trigger attribution under an "equity or debt plus" approach.

14. Triggering Relationships. The "equity or debt plus" approach would focus directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence such that the interest may implicate diversity and competition concerns and should be attributed. As noted above, we seek comment as to whether the application of the equity and/or debt benchmarks discussed below should be triggered where the interest holder is either: (1) a broadcaster or other media entity in any service implicated by any of the current cross-ownership rules, which operates in the same market; or (2) a program supplier.

15. The approach of focusing on specified triggering relationships would extend the Commission's current recognition that the category or nature of the interest holder is important to whether an interest should be attributed. For example, under the current broadcast attribution rules, passive investors are subject to a higher voting stock attribution benchmark,[24] since these parties are subject to fiduciary and other restraints on their exercise of influence over licensees and are, by their nature, principally concerned with investment returns rather than direct influence over the licensee.

16. Same-market broadcasters and certain other same-market media entities may raise

[24] 47 C.F.R. § 73.3555 Note 2(c).

particular concerns because of our goal of protecting local diversity and competition. Firms with existing local media interests could use financing or contractual arrangements, such as LMAs, to obtain a degree of horizontal integration within a particular local market that should be subject to local multiple ownership limitations. Indeed, the Commission's cross-interest policy reflects its concern for competition and diversity where an entity has an attributable interest in one media outlet and a "meaningful relationship" with another media outlet serving substantially the same area, *i.e.*, in the same market.[25] In such cases, if the "equity or debt plus" approach is adopted, an attributable investment in one broadcast or other media outlet subject to the broadcast cross-ownership rules (*i.e.*, cable systems and newspapers), combined with a substantial non-attributable investment in a second station or media outlet subject to the cross-ownership rules in the same market, would trigger attribution of both stations or media interests to the interest holder, where common ownership of the two entities involved would be barred by the broadcast cross-ownership rules. We seek comment on this option. Certainly, television broadcasters should be included as "same-market broadcasters," as should radio stations. We also believe that other media entities captured by the cross-ownership rules (*i.e.*, daily newspapers and cable operators) should be subject to the "equity or debt plus" approach, just as they are subject to our broadcast cross-ownership rules, but we seek comment on the implications of including daily newspapers and cable operators within the scope of this proposal. In particular, how should we define what is the "same market" for purposes of applying the "equity or debt plus" proposal to these latter entities?

17. We also invite comment on whether we should include program suppliers under the "equity or debt plus" attribution test to address our concern and that of some commenters that program suppliers such as networks could use nonattributable interests to exert influence over critical station decisions, including programming and affiliation choices. In recent transactions involving program suppliers, it has appeared that nonattributable investors can be granted rights over licensee decisions that might afford them significant influence over the licensee.[26] We note that radio and television time brokerage agreements or LMAs are program supply contracts and would be encompassed under the "equity or debt plus" attribution approach, if we specify program suppliers as a triggering category. Thus, under the "equity or debt plus" approach, such agreements might result in attribution in specific cases if the brokering station holds a financial interest in or acts as a creditor of the brokered station. Television time brokerage agreements might also be attributable under the *per se* LMA attribution approach discussed below.

18. One recent transaction, for example, required us to decide whether to attribute complex and substantial financial interests that a national television network held in the proposed

[25] For a recent application of the policy and statement of this justification, *see Roy M. Speer*, FCC 96-258, ¶¶ 124-25, released June 14, 1996.

[26] *See, e.g.*, ¶ 18 *infra* for a discussion of a particular case that raised concerns over the kinds of interests and rights that are currently nonattributable.

assignee of a television station and associated translator station.[27] The proposed assignee was a multiple station owner whose stations were affiliated with the network investor. We found that the collective interests and relationships in that case "do not squarely fall within any of the cases ... in which the Commission has previously found multiple relationships between a network and its affiliate nonattributable."[28] We therefore granted the application conditioned upon the outcome of this rulemaking proceeding.[29] Other recent cases have raised similar concerns and are also conditioned on the outcome of this proceeding.[30]

19. We tentatively conclude that there is the potential for certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a

[27] *BBC License Subsidiary L.P (WLUK-TV)*, 10 FCC Rcd 7926 (1995). These interests included: 45 percent of the cash equity in the licensee; nonvoting stock representing 25 percent of the common stock; an option to acquire up to half of the shares of common stock; an option, exercisable for one year following acquisition of certain television stations, to purchase shares amounting to one-half of the shares of common stock; a contractual right to convert, slightly less than three years after entering into the joint venture arrangement, the stock to voting stock; and approval rights over certain major decisions of the licensee, such as expansion of operations into new business areas, mergers, consolidations and acquisition of other businesses, the sale of assets, the sale of securities and issuance of stock, the amendment of the corporate by-laws and dividend payment decisions. Additionally, the network had agreed to the slate of directors, including its own former employee, sitting on the applicant's board for the first three years; had one of its current employees scheduled to assume an executive position with the venture; and had a contractual commitment from the assignee to enter into a 10-year network affiliation agreement for its stations and to "at all times use its best efforts" to operate the stations as an affiliate of the network.

[28] *Id.* at ¶ 43. Moreover, we noted that: "whether and under what circumstances multiple relationships, which taken individually are nonattributable, should be considered attributable in the aggregate, is precisely the question we have posed in the pending rulemaking on attribution.... We believe that question is a very difficult one, one that is best answered with the benefit of a full and carefully considered record in the *Attribution Review* proceeding." *Id.*

[29] *Id.* at ¶ 44.

[30] These include *Roy M. Speer*, FCC 96-258, released June 14, 1996; *BBC License Subsidiary L.P. (KHON-TV et. al)*, 10 FCC Rcd 10968 (1995); *BBC License Subsidiary L.P (WLUK-TV)*, 10 FCC Rcd 7926 (1995); *Quincy D. Jones*, 11 FCC Rcd 2481 (1995); Letter to Heritage Media, Inc. *et al.* from Roy J. Stewart, Chief, Mass Media Bureau, dated Jan. 18, 1996 (FCC File Nos. BTCCT-950911KF-KG and BALCT-950628KJ-KL); Letter of Roy J. Stewart, Chief, Mass Media Bureau, dated May 8, 1995, Re File Nos. BALH-940323GE and BAL-940330EA (Cincinnati, Ohio); Letter of Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau, Ref. 1800B2, 8910-BD, dated June 8, 1995, Re File Nos. BAL-940525EA, BALH-940525EB (Wellington and Fort Collins, Colorado). Additionally, on March 27, 1996, the staff, acting pursuant to delegated authority, conditioned the grant of applications seeking authorization for the transfer of control of Noble Broadcast Licenses, Inc., licensee of radio stations serving communities in Ohio, Missouri, Illinois, and Colorado, to Jacor Communications, Inc., on the outcome of this proceeding. We do not seek nor will we consider in this proceeding comments on the merits of the decisions in these particular cases. If necessary, we will issue separate orders to apply any new rules resulting from the instant proceeding to the cases that have been conditioned on its outcome. We mention these cases here only to illustrate the kinds of relationships and interests that have aroused concerns about the need to revise our attribution rules and invite comment, as discussed below, on these relationships and interests in general.

minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or more influence or control over some corporate decisions as voting equity holders whose interests are attributable. We seek specific comment on this issue.

20. If we were to apply this new attribution approach to program suppliers, we would need to decide how to define the category of "program supplier." We seek comment on how the definition should be set. One potential definition would include all entities from which a broadcast licensee obtains programming, including program producers, syndicators and networks. As noted above, these entities in particular may have inherent interests in influencing programming decisions. Alternatively, should we limit the definition to networks or only to program suppliers that supply significant or substantial quantities of programming to the licensee? If we limit the definition to networks, how should we define a network for these purposes? Alternatively, if we were to adopt a criterion based on the amount of programming supplied, what amount of programming would be sufficient for us to classify an entity as a program supplier for purposes of applying the "equity or debt plus" approach? In addition, where the program supplier is an entity in which other persons or entities hold interests, how great an interest in a program supplier can a person or entity hold without being deemed to be a program supplier for purposes of applying the debt or equity plus rule? Should we treat as program suppliers only those persons or entities that hold a controlling interest (*de facto* or *de jure*) in a program supplier? Alternatively, should we apply our broadcast attribution rules in answering this question? Under such an approach, for example, applying the current attribution rules, the holder of five percent of the voting stock in a program supplier would be considered to be a program supplier for purposes of applying the equity or debt plus approach. As another alternative, should we establish a separate benchmark to be applied in making this determination? If the last, what should that benchmark be?

21. Finally, if we include programming suppliers among the cognizable relationships that would trigger the equity or debt thresholds discussed above, we nonetheless wish to avoid disrupting the flow of capital to television stations to fund, among other things, the conversion to digital television, which we anticipate will be costly. We invite comment as to whether the "equity or debt plus" approach would significantly hinder networks or other telecommunications entities from helping stations to fund the conversion to digital television, and, if so, if this is a significant problem.

22. Investment Thresholds. Under the foregoing approach, where the creditor or equity interest holder is a same-market broadcaster or a program supplier to the station in question, in addition to applying the existing attribution criteria, we would attribute any financial interest or investment in the station or other media outlet that exceeds specified equity or debt thresholds. We would aggregate the equity interests of such an investor (including both non-voting stock in whatever form it is held and voting stock) in a licensee or other media outlet for purposes of applying the equity threshold and would apply the same approach with respect to aggregating all debt holdings in applying the debt threshold. We seek comment as to whether preferred stock

should be treated as equity or as debt for purposes of applying the threshold. Additionally, when the investor's total investment in the licensee or other media outlet, aggregating all debt and equity interests,[31] exceeds a specified threshold percentage of all investment in the licensee (the sum of all equity plus debt), attribution would also be triggered. In aggregating the different classes of investment, equity and debt, we propose to use total capitalization as a base. We invite comment on these views. Is the approach proposed workable? Would aggregating different classes of investment pose difficulties, and, if so, how can these difficulties be avoided?

23. We invite comment on what specific percentage threshold(s) we should set for purposes of applying the foregoing approach, and we specifically request commenters to provide factual and empirical data to support the threshold or benchmark they advocate. We are inclined to set the equity and debt thresholds at the same level because the rationale for including such investments, *i.e.*, those affording the ability to influence important station decisions, is the same for all such forms of investment. A 33 percent benchmark might be reasonable for these purposes. We invite comment on whether a higher or lower benchmark would be more effective in achieving our diversity and competition goals, while not unduly disrupting capital flow. We believe that the threshold should be at least as high as the passive investor benchmark, whether that benchmark be 10 percent, as under the current rules, or 20 percent, as proposed in the *Notice* in this proceeding. Additionally, we do not want to set the limit so low as to unduly disrupt capital flow to broadcasting. Finally, we note that, in the context of its cross interest policy, the Commission has permitted a nonattributable equity interest as large as 33 percent.[32] In *Cleveland Television*, the Commission held that a one-third non-voting preferred stock interest by a broadcaster in another station in the same market conferred "insufficient incidents of contingent control" to violate the multiple ownership rules or the cross-interest policy, and that the holders, by virtue of ownership of the non-voting preferred stock interest would not retain the means to directly or indirectly control the station.[33] We invite comment on the validity of this conclusion in the context of the "equity or debt plus" approach. Additionally, we seek comment on the impact of a 33 percent threshold on small business entities, particularly on whether there would be a disproportionate effect on small or minority entities.

24. With respect to the specific benchmark proposed, the comments reveal that the networks have substantial nonattributable investments in affiliated stations and that group owners

---

[31] As an example of aggregating these interests, an investor holding $9,000,000 of the common stock (whether voting or nonvoting) and $8,000,000 of the debt of a broadcast company with total equity of $20,000,000 and total debt of $80,000,000 would own 45.0 percent of equity, 10.0 percent of debt and 17.0 percent of the company's assets. In this example, of course, the investor would have its interest attributed (assuming that it is either a same-market broadcaster or program supplier to the licensee) based simply on the holding of the 45 percent equity investment.

[32] *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1132-35 (Rev. Bd. 1982), *review denied*, FCC 83-235 (May 18, 1983), *aff'd, Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) ("*Cleveland Television*"). *Accord, Roy M. Speer*, FCC 96-258, ¶¶ 124-26, released June 14, 1996.

[33] *Cleveland Television*, 91 FCC 2d at 1132-35.

have nonattributable investments in other stations.[34] We invite commenters to give us current data as to the typical nonattributable interests held by networks and group owners in other stations and how those relationships might be affected by the proposed changes. We ask commenters to designate whether the station is a small business as defined by the Small Business Administration ("SBA"),[35] and/or is minority or woman-owned. Such information would be useful in weighing the probable impact of setting the threshold at the 33 percent level or another level. Finally, we note that nonvoting shares, debt, and voting minority shares in a corporation with a single majority shareholder are not reported under current ownership report forms, and, if we adopt the "equity or debt plus" proposal, we would need to modify our ownership forms accordingly. We invite comment as to how we should modify our ownership report form, FCC Form 323, for this purpose.

25. We also invite comment as to whether the targeted approach outlined above would be preferable to a case-by-case approach that determines whether an interest should be attributed based directly on the kinds of powers granted to an interest holder in contract language. For example, in some recent transactions, currently nonattributable investments have been accompanied by contractual provisions that essentially give the investor veto power over decisions normally made by the board of directors under the authority of the voting shareholders.[36] Such combined provisions could give the investor undue power to influence operational decisions. One approach to handling these cases might be to base attribution on the type of contract language that yields control over decisions of concern to us. Although such an *ad hoc* approach is more tailored than a generic rule, it also might lead to complicated interpretation and processing difficulties and might add uncertainty to resolution of attribution cases. Thus, a bright line approach, such as the "equity or debt plus" approach, which clearly defines those business relationships that cause the greatest concern, could provide certainty and minimize regulatory costs. We invite comment as to whether a bright line test, where attribution would be linked to the size of an investor's interest, can serve as a proxy for these concerns,

---

[34] For example, according to the NASA Comments, Exhibit 1, filed in May 1995: ABC had a 14.7 percent nonattributable interest in 10 stations in addition to the stations in which it owned a 100 percent interest; CBS had a 49 percent nonattributable interest in one station in addition to transactions pending to acquire other nonattributable interests in connection with a station swap with NBC; Fox had a 20 percent nonattributable interest in the stations attributed to New World, a 25 percent nonattributable interest in the stations attributed to SF/Savoy, and a proposed 20 percent nonattributable interest in the Blackstar stations; and NBC had a 49 percent nonattributable interest in one station. Of course, this information is over one year old. Indeed, in the interim, both CBS and ABC have been sold to other entities that are group owners.

[35] The SBA defines a small television station as one that has no more than $10.5 million in annual receipts. 13 C.F.R. §121.201. *See also* Initial Regulatory Flexibility Analysis, Appendix A.

[36] For example, in *BBC License Subsidiary L.P (WLUK-TV)*, 10 FCC Rcd 7926 (1995), in addition to holding 45 percent of the cash equity in the licensee and other contractual rights, the investor had approval rights over certain major decisions of the licensee, such as expansion of operations into new business areas, mergers, consolidations and acquisition of other businesses, the sale of assets, the sale of securities and issuance of stock, the amendment of the corporate by-laws and dividend payment decisions.

based on the assumption that the degree of contractual rights an investor may hold is typically related to the level of his investment. Also, would the "equity or debt plus" approach capture those cases where currently nonattributable investments are accompanied by contractual provisions that have aroused the foregoing concerns?

2. Attribution of Time Brokerage Agreements or LMAs

26. An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming.[37] Currently, the Commission does not attribute television LMAs, and, accordingly, these relationships are not subject to our multiple ownership rules. However, in the radio context, time brokerage of another radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours results in attribution of the brokered station to the brokering licensee for purposes of applying our multiple ownership rules.[38]

27. In our *TV Ownership Further Notice*, we tentatively proposed to attribute television LMAs based on the same principles that apply to radio time brokerage agreements. Thus, time brokerage of another television station in the same market for more than fifteen percent of the brokered television station's weekly broadcast hours would be held to be attributable, and therefore would count toward the brokering television licensee's national and local ownership limits.[39] We hereby incorporate this proposal into this proceeding,[40] and tentatively conclude that it should be adopted as a stand-alone LMA attribution standard. We specifically propose here

---

[37] *TV Ownership Further Notice*, ¶ 133. *See* 47 C.F.R. 73.3555(a)(4)(iii). As noted above, note 4 *supra*, we will refer to LMAs as time brokerage agreements between stations in the same market.

[38] *See* 47 C.F.R. § 73.3555(a)(4)(i).

[39] *TV Ownership Further Notice*, ¶ 138. When the *TV Ownership Further Notice* was released, we applied national multiple ownership limits to radio stations, and the brokered station was attributed to the brokering station for purposes of applying both those national limits and the local limits. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *on reconsideration*, 7 FCC Rcd 6387, 6400-01 (1992) ("*First Radio Ownership Reconsideration Order*"), *on further reconsideration*, 9 FCC Rcd 7183, 7191 (1994). Subsequently, the national ownership limits were eliminated for radio. *See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, FCC 96-90, 61 Fed. Reg. 10689 (March 15, 1996). Accordingly, the interest is counted only in applying local radio ownership limits. National multiple ownership limits apply to television stations, however, and, under our proposal, the brokered television station would be counted toward the brokering television station's national and local ownership limits, including the one-to-market rule. We note, however, that the narrow issue of whether the audience reach of a brokering and a brokered station serving the same market would both be counted toward the audience reach cap, with the effect of double counting the stations, will be decided in our proceeding concerning the television national multiple ownership rules. *Notice of Proposed Rule Making* in MM Docket Nos. 96-222, 91-221 & 87-8, FCC 96-437, released November 7, 1996.

[40] We incorporate into the record of this proceeding the Comments and Reply Comments filed in the TV Ownership proceeding to the extent that they deal with the issues incorporated into this proceeding.

that LMAs, if attributable, would also count in applying our other ownership rules, including, for example, the broadcast-newspaper cross-ownership rule,[41] the broadcast-cable cross-ownership rule,[42] and the one-to-a-market rule (or radio-television cross-ownership rule).[43] We request comment on these tentative proposals. In particular, are there differences between radio and television services and markets that would justify applying a different percentage (other than the fifteen percent applied with respect to radio) to television LMAs for purposes of determining whether to attribute them? We also note that if we adopt this proposal for television LMAs, the radio LMA rules (47 C.F.R. § 73.3555(a)(3)) would have to be modified accordingly, since radio LMAs are currently considered only for purposes of applying the radio contour overlap rule (47 C.F.R. § 73.3555(a)(1)), and invite comment on how the radio LMA attribution rules should be modified in this regard. We also incorporate the tentative proposal that attributable television LMAs be filed with the Commission in addition to being kept at the stations involved in an LMA.[44] We note that we asked in the *TV Ownership Further Notice* whether the program duplication or simulcasting limits that apply to commonly owned or time brokered radio stations should apply to TV LMAs.[45] We will also resolve that issue in this proceeding.

28. The proposed *per se* LMA attribution standard would apply whether or not the LMA holder has other multiple business relationships with the brokered station or otherwise has a financial investment in the brokered station. While time brokerage agreements not involving a television station in the same market would not fall under this *per se* LMA attribution standard, as discussed above, such time brokerage agreements could be attributable under the "equity or debt plus" approach, if adopted, where the brokering station has an equity and/or debt interest in the brokered station that exceeds the specified investment threshold.[46] We invite updated comments on all aspects of the foregoing tentative conclusions and proposals.

29. In making this proposal to attribute television LMAs in the *TV Ownership Further Notice*, we also recognized the need to deal with pre-existing television LMAs and asked whether we should grandfather television LMAs entered into prior to December 15, 1994, the date of adoption of the *TV Ownership Further Notice*, and whether we should subject such existing LMAs to renewability and transferability guidelines similar to those governing radio LMAs.[47]

---

[41] 47 C.F.R. § 73.3555(d).

[42] 47 C.F.R. § 76.501(a).

[43] 47 C.F.R. § 73.3555(c).

[44] *See TV Ownership Further Notice*, ¶ 138. *See* 47 C.F.R. § 73.3613(d).

[45] *TV Ownership Further Notice*, ¶ 139.

[46] Thus, under the proposals enumerated in this *Further Notice*, LMAs are potentially attributable under a *per se* LMA attribution rule and/or under the "equity or debt plus" approach discussed above.

[47] *TV Ownership Further Notice*, ¶¶ 138-40.

However, if we do decide to attribute LMAs as we propose here, we intend to resolve the grandfathering, renewability and transferability issues in the separate TV local ownership docket[48] so that we can evaluate the extent to which grandfathering may be needed based on the nature of the local ownership rules we adopt.

30. With respect to our tentative proposal in the *TV Ownership Further Notice*, now incorporated within this attribution proceeding, to attribute certain television LMAs to the brokering station for purposes of applying the multiple ownership rules, commenters voiced a range of positions. Some opposed attributing television LMAs for ownership purposes, particularly if the Commission does not relax its duopoly rule.[49] Others supported using the radio rules as a blueprint for regulating television LMAs.[50] Still other parties argued for more restrictive rules.[51] However, commenters generally failed to provide the Commission with the kind of factual information we seek. Consequently we once again request quantitative information on the number and characteristics of existing television LMAs.[52]

31. We are especially interested in information on the typical geographic proximity of the brokering and brokered stations, the typical term of television LMAs, the typical renewal provisions, the typical arrangements between the brokered station and the broker on the sale of advertising time during brokered time periods, the percent of brokered station time sold to the program supplier in an LMA, and the typical arrangements between the brokered station and the broker to allow the brokered station to reject broker-supplied programming that the brokered station deems not in the public interest to broadcast. Since television LMAs are not now attributable, they are not required to be filed with the Commission, and we consequently have little information about their terms and characteristics. We ask commenters to provide us with information as to whether such agreements typically require the broker to make fixed payments to the brokered station or whether other payment terms are applicable. Do LMAs typically require that the broker sell all the brokered time? Do they call for the broker to provide the brokered station with studio services at the broker's facility? Is there a typical LMA? Are there typical provisions or do these agreements vary widely? Can we draw general conclusions about LMAs? Are there classes or categories of LMAs that should be subject to different attribution treatment? Finally, we want to emphasize, as we did in our radio ownership proceeding, "that the licensee is ultimately responsible for all programming aired on its station, regardless of its

[48] *See TV Ownership Second Further Notice*, Section IV.

[49] *See, e.g.*, Comments of Association of Independent Television Stations, Inc., now known as Association of Local Television Stations, Inc. ("ALTV"), filed in MM Docket Nos. 91-221 & 87-8 at 29, n.52; Comments of Kentuckiana Broadcasting, Inc. filed in MM Docket Nos. 91-221 & 87-8 at 5-6.

[50] *See, e.g.*, Comments of ABC, filed in MM Docket Nos. 91-221 & 87-8, at 26-27.

[51] *See* Comments of Post-Newsweek Stations, Inc., filed in MM Docket Nos. 91-221 & 87-8, at 8-9.

[52] *See TV Ownership Further Notice*, ¶ 136.

source."[53] In this regard, we invite comment on what, if any, specific safeguards we should adopt with respect to television LMAs to ensure a brokered station's ability to exercise its programming responsibility.[54]

3. Joint Sales Agreements (JSAs)

32. In the *Attribution Notice*, we requested comment on whether, through multiple cooperative arrangements or contractual agreements, broadcasters could so merge their operations as to implicate our diversity and competition concerns.[55] We noted, however, that we did not intend to reopen our earlier decisions permitting joint sales practices in radio and television.[56] These decisions, of course, allowed joint sales practices subject to compliance with the antitrust laws.[57]

33. Subsequent to issuing the *Attribution Notice*, the staff has been presented with cases involving joint sales agreements (*i.e.*, agreements for the joint sales of broadcast commercial time) that have raised anew diversity and competition concerns with respect to such agreements.[58] This leads us to ask whether non-ownership based mechanisms such as JSAs that might convey

---

[53] *First Radio Ownership Reconsideration Order*, 7 FCC Rcd 6387, ¶ 63 (1992).

[54] For instance, radio time brokerage agreements of the type described in Section 73.3555(a)(3)(i) of our Rules must be reduced to writing and contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including control over station finances, personnel, and programming. *See* 47 C.F.R. § 73.3555(a)(3)(ii).

[55] *Attribution Notice*, ¶¶ 94-95.

[56] *Attribution Notice*, ¶ 95.

[57] Indeed, we have stated that separately owned stations can function cooperatively in terms of advertising sales and other aspects "so long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws." *Report and Order, Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2787 (1992), *reconsidered on other grounds*, 7 FCC Rcd 6387 (1992), *further reconsidered on other grounds*, 9 FCC Rcd 7183 (1994). *Accord, Notice of Proposed Rulemaking, Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3281 (1991) (joint sales practices "if not carefully formulated could be subject to challenge as involving anticompetitive price fixing or market divisions"); *Report and Order* in BC Docket No. 80-438 (*In the Matter of Representation of Stations by Representatives Owned by Competing Stations in the Same Area*), 87 FCC 2d 668, 682 (1981) ("market structure and antitrust laws and policies will deter anticompetitive practices."); *Policy Statement* in MM Docket No. 87-154 (*Cross-Interest Policy*), 4 FCC Rcd 2208, 2213-14 (1989); *Second Report and Order* in MM Docket No. 83-842, 59 RR 2d 1500, ¶ 49 (1986), *reconsidered on other grounds*, 2 FCC Rcd 3474 (1987) ("the removal here of our policies will open the marketplace to function freely, within the limitations of the antitrust laws").

[58] *See, e.g.*, Letter of Roy J. Stewart, Chief, Mass Media Bureau, dated May 8, 1995, Re File Nos. BALH-940323GE and BAL-940330EA (Cincinnati, Ohio); Letter of Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau, Ref. 1800B2, 8910-BD, dated June 8, 1995, Re File Nos. BAL-940525EA, BALH-940525EB (Wellington and Fort Collins, Colorado).

influence or control over advertising shares should be considered, and possibly attributed. For example, where one station owner controls a large percentage of the advertising time in a particular market, it could potentially exercise market power. Accordingly, we invite additional comments on the potential effects of JSAs among same-market broadcasters on diversity and competition. We also seek comment as to whether we should attribute JSAs among licensees in the same market, including both radio and television licensees, irrespective of whether they are accompanied by the holding of debt or equity.

34. We recognize that a JSA not involving stations in the same market may permit influence over station operations. Nonetheless, we distinguish between JSAs in the same market and JSAs among stations not located in the same market. Our concern for media concentration has been focused on local markets. For example, in the radio context, only LMAs among stations in the same market are subject to attribution, and we apply only local multiple ownership limits. And, in the television context, we have similarly been more concerned with local markets because the video program delivery market is a local market.[59] Following this traditional concern for local markets, we focus on JSAs in local markets. We invite comment on this approach.

35. We seek general information concerning the typical contractual terms of JSAs. What is the typical length of such agreements and are they automatically renewable? How are the station owner and broker compensated? Are there package deals among several stations? Does the broker get involved in the operation of the station, including programming and finances, either directly or indirectly? As a practical matter, do typical JSAs differ from LMAs or do time brokerage agreements usually accompany JSAs? What other arrangements typically occur between parties in terms of station operations, joint sales force utilization, or joint use of production facilities? In addition, what kind of efficiencies arise with JSAs, how are these shared among parties to the JSA, and how do these benefits differ from those of LMAs? Finally, what impact do JSAs have on competition, and under what circumstances, if any, should the interest of the broker/JSA holder be held attributable? If we were to consider JSAs, should such interests be attributable in all circumstances involving stations in the same market, or only where the broker also has some influence over the programming or other operations of the brokered station? Alternatively, should we apply another criterion in deciding whether to attribute JSAs, such as attributing JSAs among same-market stations where the brokering station exceeds a specific market share benchmark? We seek comment on these issues and any other relevant questions concerning whether or not JSAs should be attributable, at least under certain circumstances.

C. Voting Stock Benchmarks

36. In the *Notice*, as discussed above, we requested comment as to whether we should increase the voting stock benchmarks from five to ten percent for active investors and from ten to twenty percent for passive investors. In response, the majority of commenters that responded

[59] *See TV Ownership Further Notice*, ¶¶ 31, 36-45, 87-88.

to these issues favor increasing the benchmarks.[60] However, commenters did not submit, in response to the *Notice*, the kind of specific, empirical evidence that we believe may be necessary before we can reasonably conclude that the benchmarks should be raised, and we invite additional comments to provide such additional evidence and economic studies. Our decision will be aided by additional information on the changes in the economic climate and competitive marketplace that would appear to justify raising the benchmark or explain and verify the link between raising the attribution benchmark and precipitating additional capital investment. Accordingly, we ask for specific and empirical information in a number of areas to justify raising the benchmarks.

37. In this regard, Commission staff has conducted a study of the attributable interests in commercial broadcast television licensees, as reported in the ownership reports licensees are required to file. The results of the staff study are set forth in Appendix B. One conclusion from that study is that increasing the attribution benchmark for active investors from five percent to ten percent would decrease the number of currently-attributable owners by approximately one-third. The number of stations for which no stockholder would be attributable would increase from 81 to 134 stations (out of 389 commercial for-profit television stations that are incorporated and are not single majority shareholder stations), under current stock distribution patterns.

38. We invite comment on all aspects of this study, including its implications for our attribution rules. Does the study suggest that existing attribution criteria appropriately balance the goals of identifying those interests that should be counted in applying the multiple ownership rules, while not unduly disrupting capital flow? Would stockholding or investment patterns change in response to a change in the attribution rules? If so, how would they change, and why would they change? Would there be a significant impact on capital flow, given the relaxation of the multiple ownership rules resulting from passage of the 1996 Act? Is there a need to encourage additional capital investment?

D. Transition Issues

39. In the *Notice*, we stated our concern that any action taken in this proceeding not disrupt existing financial arrangements, and, accordingly, invited comment as to whether we should grandfather existing situations or allow a transition period for licensees to come into compliance with the multiple ownership rules if we adopt more restrictive attribution rules.[61] All commenters that have addressed this issue in response to the *Notice* urge the Commission to

[60] *See, e.g.*, Comments of ALTV; Comments of National Broadcasting Company, Inc. ("NBC"); Comments of Tribune Broadcasting Company; Comments of Capital Group Companies, Inc. While noting that there is room to relax the benchmarks and that the increase will not increase influence to any significant degree, CBS Inc. ("CBS") notes that the current benchmarks are not unduly restricting investment. Comments of CBS at 8-9. Some commenters supported raising the benchmarks even higher than we had proposed. For example, in jointly-filed comments, M/C Partners, The Blackstone Group, and Vestar Capital Partners ("M/C") supported an increase to 50 percent for all voting stock interests. Comments of M/C at 16-18.

[61] *Attribution Notice*, ¶ 15.

grandfather existing interests indefinitely if it adopts more restrictive attribution rules because of the disruptive effect and the unfairness to the parties of mandatory divestiture.[62] According to CBS, the alternative of a transition period would not provide real relief from restrictive attribution rule changes, such as restricting the availability of the single majority shareholder exemption.[63]

40. We now seek additional comment on the option of a transition period, particularly since the national television multiple ownership rules have recently been relaxed, as have the local radio multiple ownership rules, and the national radio ownership limits have been eliminated. In light of these developments, we believe that the impact of attributing previously nonattributable interests after a transition period could be far less serious than if the attribution rules were changed without a contemporaneous relaxation of the multiple ownership rules. Accordingly, we invite commenters again to address the transition/grandfathering issue in light of these different circumstances, including the appropriate length for any transition period that may be adopted. We reiterate that the issue of grandfathering of television LMAs, should we decide to attribute them, will be resolved in the television local ownership proceeding; in this *Further Notice*, we refer only to transition and grandfathering issues related to the other (non-LMA) attribution issues raised in this attribution proceeding.

41. If we grandfather existing interests, what grandfathering principle should we apply? We tentatively conclude that any grandfathering should only apply to the current holder. Such grandfathering would mean that the relationship would be held attributable, but the holder would not be required to divest holdings in the event that the attribution resulted in the holder exceeding our ownership limits. If the joint holdings were later sold, that ownership grandfathering would not transfer to the assignee or transferee. Accordingly, the holding, which was previously attributable but did not have to be divested even if it exceeded our ownership limits, would now require divestment if it exceeded our ownership limits. We seek comment on this issue. We also invite comment as to the extent of grandfathering that would be required if we restrict attribution rules.

---

[62] *See, e.g.*, Comments of ALTV; Comments of Big Horn Communications, Inc. ("Big Horn"); Comments of ABC (new attribution rules should be prospective only; interests nonattributable at the time of acquisition should remain nonattributable); Comments of CBS; Comments of EZ Communications, Inc.; Comments of Fox Television Stations & Fox Broadcasting Company (currently non-attributable interests should continue to be treated as non-attributable for all purposes); Comments of New World Communications Group Incorporated; Comments of Silver King Communications, Inc. (restrictive changes to the attribution rules should be prospective only; existing nonattributable relationships should be grandfathered; grandfathering should include entities with pending applications at the Commission where such entities have established their legal corporate existence and binding contracts are in place); Comments of Westinghouse Broadcasting Company (Group W) (existing ownership arrangements should be grandfathered; a transition period is no more justifiable than an immediate divestiture requirement; forced divestiture covering an entire industry will negatively impact marketplace); Comments of Tribune; Reply Comments of EZ; Reply Comments of General Electric Capital Corporation; Reply Comments of the Goodman Sachs Group, L.P.; Reply Comments of Lin Television Corporation; and Reply Comments of M/C.

[63] Comments of CBS at 13-14.

42. Finally, regardless of what policy we ultimately adopt with respect to either a transition or grandfathering of existing interests, we tentatively conclude that any interests acquired on or after December 15, 1994, the date of adoption of the *Notice* in this proceeding, should be subject to the final rules adopted in the *Report and Order* in this proceeding. We seek comment on this approach, and whether a subsequent grandfathering date would be more appropriate. In the event that we adopt a transition period, what is the appropriate length for such a transition period? We tentatively propose that any such transition period adopted to permit divestiture of such interests should be relatively short and no longer than six months.[64]

E. Cable/MDS Cross-Ownership Attribution

43. We also take this opportunity to consider changes to the cable/Multipoint Distribution Service ("MDS") cross-ownership attribution rule.[65] Section 613(a) of the Act states that "[i]t shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service . . . in any portion of the franchise area served by that cable operator's cable system." 47 U.S.C. § 533(a) (emphasis added). The Commission may waive the requirements of this provision "to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming." 47 U.S.C. § 533(a)(2).[66] Section 613(a) was added by Section 11(a) of the 1992 Cable Act. In implementing Section 613(a), the Commission modified its existing cable/MDS cross-ownership rule in Section 21.912 of the rules.[67] Section 21.912(a) prevents a cable operator from obtaining an MDS authorization if any portion of the MDS protected service area overlaps with the cable system's franchise area actually being served by cable. Section 21.912(b) also prohibits a cable operator from leasing MDS capacity if its franchise area being served overlaps with the MDS protected service area. For purposes of this rule, "an attributable ownership interest shall be defined by reference to the definitions contained in the Notes to § 76.501, provided however, that:

> (i) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and
> (ii) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests

---

[64] *See, e.g., Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996).

[65] For purposes of this item, MDS also includes single channel Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS").

[66] *Compare* 47 U.S.C. 537(d) (before the 1996 Act, providing broad authority for "public interest" waivers of the cable anti-trafficking restriction). The cable/MMDS cross-ownership prohibition does not apply if the cable operator is subject to "effective competition" in its franchise area. *Id.* § 533(a)(3) (added by 1996 Act).

[67] *Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993) ("*Implementation Order*"), *reconsidered on other grounds*, 10 FCC Rcd 4654 (1995)..

of five (5) percent or more."[68]

44. This strict attribution standard severely restricts investment opportunities that are compatible with our goal of strengthening wireless cable and providing meaningful competition to cable operators. Additionally, we see no reason to have different attribution criteria for broadcasting and MDS. We have previously observed that "the Commission could employ the broadcast attribution criteria contained in Section 73.3555 (Notes) of its Rules, or such other attribution rules as the Commission deemed appropriate for this purpose."[69] Thus, the instant proceeding provides us with an opportunity to revisit our current attribution standard consistent with our responsibility to achieve the objective of diversity while "balancing genuine and significant efficiencies."[70] Therefore, we invite comment on whether we should apply broadcast attribution criteria, as modified by this proceeding, in determining cognizable interests in MDS licensees and cable systems for purposes of applying the ownership restrictions of Section 21.912 of our Rules. In addition, we seek comment as to whether we should add an "equity or debt plus" attribution rule where the competing entity's holding exceeds 33 percent or some other benchmark. We believe that these proposed modifications of our attribution rule will increase the potential for investment consistent with our responsibility "[t]o further diversity and prevent cable from warehousing its potential competition."[71]

IV. CONCLUSION

45. By this *Further Notice of Proposed Rule Making*, we request comments to update the record in this proceeding, which is intended to determine whether the attribution rules continue to be effective in identifying those interests that should be counted for purposes of applying the multiple ownership rules. It is important to ensure that these rules operate accurately so that we apply the multiple ownership limits, which have recently been relaxed as a result of passage of the 1996 Act, in an appropriate manner, and that the attribution rules are not used as a means to evade or circumvent these limits. We believe that the concerns and issues raised in the comments and in this *Further Notice* are of utmost importance, and we look forward to well-reasoned and empirically-based comments with respect to these issues.

V. ADMINISTRATIVE MATTERS

46. Filing of Comments. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before February 7, 1997 and reply comments on or before March 7, 1997. To

[68] 47 C.F.R. § 21.912 (note 1(A)).

[69] *Implementation Order* at 6843.

[70] S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991)

[71] *Id.*

file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. Parties are also asked to submit, if possible, draft rules that reflect their positions. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 219), 1919 M Street, N.W., Washington, D.C. 20554.

47. Initial Paperwork Reduction Act of 1995 Analysis. This *Further Notice* contains either a proposed or modified information collection (i.e., revision of Annual Ownership Report, FCC Form 323). As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days from the date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

48. Written comments by the public on the proposed and/or modified information collections are due February 7, 1997. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

49. Ex Parte Rules. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.206(a).

50. This *Further Notice* is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303.

51. Additional Information. For additional information on this proceeding, contact Mania K. Baghdadi (202) 418-2130 or Berry Wilson (202) 418-2024, Policy and Rules Division, Mass Media Bureau.

52. Initial Regulatory Flexibility Analysis. With respect to this *Further Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in this *Further Notice*. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the radio and television broadcasting industries. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Further Notice*, but they must have a distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.[72]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[72] Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981), as amended.

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"), the Commission is incorporating an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the policies and proposals in this *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51, & 87-154 ("*Further Notice*").[73] Written public comments concerning the effect of the proposals in the *Further Notice*, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for the submission of comments in this proceeding. The Secretary shall send a copy of this *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[74]

Reasons Why Agency Action is Being Considered: After the issuance of the *Notice of Proposed Rule Making* in this Docket, the Telecommunications Act of 1996 ("1996 Act") was signed into law.[75] The *Further Notice* seeks comment as to how the multiple ownership rule revisions resulting from passage of the 1996 Act should affect our review of the attribution rules. The *Further Notice* also seeks comment on our new proposal to attribute the otherwise nonattributable interests of holders of equity and or debt in a licensee or other media entity subject to the cross-ownership rules where the interest holder is a program supplier to a licensee or a same-market broadcaster and where the equity and/or debt holding meets or exceeds specified thresholds. This proposal is intended to address the concerns expressed in the *Notice* that the current attribution rules may not precisely or fully identify all the interests in or relationships to broadcast stations that should be counted in applying the multiple ownership rules. Additionally, the *Further Notice* seeks comment on proposals concerning attribution of Local Marketing Agreements ("LMAs") and joint sales agreements ("JSAs") in specified circumstances. Also, the *Further Notice* seeks comment on a study conducted by Commission staff, appended to this *Further Notice*, on attributable interests in television broadcast licensees and on the implications of this study for our attribution rules, particularly on the voting stock benchmarks. Finally, we invite comment as to whether we should amend the cable/MDS cross-ownership attribution rule.

Need for and Objectives of the Proposed Rules: The attribution rules seek to identify those interests in or relationships to licensees or media entities that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming

---

[73] An IRFA pursuant to Pub. L. No. 96-354, § 603, 94 Stat. 1165 (1980) was incorporated into the *Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51 & 87-154, 10 FCC Rcd 3606 (1995) ("*Notice*").

[74] 5 U.S.C. § 603(a).

[75] Pub. L. No. 104-104, 110 Stat. 56 (1996).